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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted]
207

RALPH FEBRE,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner Ralph Febre prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on January 8, 1970.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit was issued on January 8, 1970. It is annexed hereto and it appears on pages A-1 - A-15 of Appendix A.* There are also set forth in Appendix A the orders of the Court of Appeals for the Second Circuit issued on May 1, 1970, denying petitioner's timely petition for reargument and re-

* Citations to appendix hereinafter will appear, "App. A, p. ", "App. B, p. "

argument *en banc*. Set forth in Appendix B is the opinion of the Court of Appeals for the Second Circuit issued on February 6, 1970, in a related case, *United States of America* v. *Edward Bless*.

Jurisdiction

The judgment of the Court of Appeals (App. A, pp. 1-15), was entered on January 8, 1970. A petition for reargument *en banc*, was denied by orders dated May 1, 1970. (App. A, pp. 16, 17). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions, Statutes Involved

The Fifth and Sixth Amendments to the Constitution of the United States; 21 U.S.C. §§ 173 and 174.

Preliminary Statement

Petitioner Febre was indicted together with Joseph Pego ("Pego") and Edward Bless ("Bless") in a multiple count indictment charging several violations relating to the sale of heroin in violation of Title 21, §§ 173 and 174.

The indictment contains five counts, the first of which charges Pego alone with the sale on February 14, 1967 of 14 grams of heroin. Counts two and three charge Pego and Febre with sales of heroin made on February 20, 1967 and March 8, 1967 of 36.72 grams of heroin and 1.3 grams of heroin, respectively. Count four charges all three defendants with a sale on April 6, 1967 of 236 grams of heroin and count five charges all three defendants with a conspiracy to violate §§ 173 and 174.

Pego pleaded guilty to all five counts of the indictment immediately prior to trial. The trial then proceeded on counts two through five against Febre and counts four and five against Bless. Evidence was offered by the Government as part of its case in chief as to count one which was directed only against Pego and not related to any of the defendants on trial.

After a five-day trial before a jury, petitioner was found guilty on counts two, three, four and five, the entire indictment as directed against him. Petitioner was sentenced by Judge Metzner to six years on each count, the sentences to run concurrently. Bless was found guilty on count four and was sentenced to seven years. At the close of the Government's case Judge Metzner granted Bless' motion for a severance of count five on the ground that the Government's proof was confusing and tended to show two conspiracies, an earlier one between Febre and Pego and a later one beginning on April 4 or 5, 1967 when Bless for the first time appeared to become a participant in a narcotics sale.

Petitioner and Bless' appeal from these convictions became separated as Bless was unable to obtain counsel. Consequently, separate panels heard each case and separate opinions were filed. Petitioner's appeal was perfected first and came on to be heard before a panel consisting of Circuit Judges Moore, Kaufman and Hays. The case was argued on September 10, 1969 and decided on January 8, 1970. Petitioner's conviction on count two was affirmed; his convictions on counts three and four were reversed. His conviction on count five—the conspiracy count—was affirmed solely because of the Court's affirmance of count two. The majority opinion refused to reverse and remand petitioner's convictions on counts two and five for a new trial. Judge Hays dissenting, voted to reverse and remand for a new trial because of the inherent prejudice by the "spill over"

of the evidence as to counts three and four and because of the fact that the trial court sent the evidence of counts three and four to the jury giving them the right to find petitioner guilty on the most tenuous evidence. (App. A, pp. 14, 15) Bless' appeal came on to be heard before a panel consisting of Chief Judge Lumbard, Circuit Judge Friendly, and Judge Mansfield, a District Judge sitting by designation, and resulted in a reversal of his conviction on count four and a remand for a new trial. (App. B, pp. 1-7) Where the issues were identical, namely, the effect of the trial court's charge to the jury, the two opinions are diametrically opposed to each other.

The facts adduced at the trial are set forth in full in each of the opinions of the Court of Appeals in the cases of *United States* v. *Febre* (App. A, pp. 1-15) and in *United States* v. *Bless* (App. B, pp. 1-7). We will not therefore burden this petition by repeating them here.

The heart of the Government's prosecution against petitioner rested on the issue of actual possession. The Government failed to offer any evidence that the narcotics in question were illegally imported into the United States or that any of the defendants including petitioner knew the narcotics to be illegally imported. The Government completely relied upon the presumption contained in § 174 which provides that the unexplained possession of narcotics shall be deemed sufficient evidence of knowledge of illegal importation. The Court of Appeals held that the considerations necessary to charge petitioner with constructive possession were completely absent in this case. Indeed, as to counts three and four, the Court of Appeals reversed because of the complete failure by the Government to offer any evidence of possession. The Court of Appeals affirmance of petitioner's conviction of count two rested upon a finding by the Court that the evidence presented by the Government

was sufficient to charge petitioner with actual possession of the narcotics involved in that count. Petitioner seeks a writ of certiorari to resolve several important questions concerning the employment of this presumption: whether the prosecution's evidence was of sufficient quality and quantity to trigger the presumption, and whether the Court properly instructed the jury on the central and vital issue of possession. In addition, the reversal by the Court of Appeals of counts three and four because of insufficient evidence and the Court's refusal to remand petitioner's conviction on count two for a new trial raises the important question of the abolition of the concurrent sentence doctrine and the formulation of a new rule of law to take its place.

Questions Presented

1. The concurrent sentence doctrine enunciated a rule providing that in a case of concurrent sentences the questioned conviction on one count will not be considered unless it can be shown that the defendant will be prejudiced if the conviction was unjustified. In *Benton* v. *Maryland*, 395 U.S. 784 (1969), a case of collateral attack seeking post-conviction relief, this Court declined to apply that doctrine and suggested that there was "no satisfactory explanation for its existence." 395 U.S. at 789. Although *Benton* did not abolish that doctrine, this Court invited assault on the doctrine by stating "A stronger case of abolition of the concurrent sentence doctrine may well be made on cases on direct appeal, ..." 395 U.S. at 793, n. 11. That question is squarely presented by this appeal: the concurrent sentence doctrine should be abolished and the rule that that doctrine fostered should be changed to one providing that prejudice will be presumed unless it is clearly shown that, in fact, no prejudice would result.

2. Do the Fifth and Sixth Amendments to the Constitution guaranteeing a defendant the right to a fair trial entitle him to a jury instruction on all the elements that must be proved to establish the crime charged?

3. Does a charge in a prosecution for conspiracy to import narcotics meet the standards of the fifth and sixth amendments where it fails to mention the essential element of possession as an element of the crime? Is the defendant entitled to a clear, concise and unambiguous charge as to the meaning of possession in a prosecution for violations of Title 21, §§ 173 and 174?

4. Is the defendant's constitutional right to a fair trial abrogated where the presumption of guilt under §§ 173 and 174 is triggered without sufficient evidence of actual possession? What constitutes sufficient evidence of possession to trigger the powerful presumption under §§ 173 and 174?

REASONS FOR GRANTING WRIT

I

This case comes before the Court as a direct appeal and raises the issue of the abolition of the concurrent sentence doctrine suggested by the Court itself in *Benton* v. *Maryland*, 395 U.S. 784 (1969).

The concurrent sentence doctrine should be abolished by this Court once and for all. Its abolition will be a significant forward step in ensuring the integrity of federal criminal prosecutions and ensuring that only the guilty are brought to trial and punished.

This Court has stated in *Benton* v. *Maryland*, 395 U.S. 784 (1969) that it could recognize no "satisfactory explanation for its existence" and declined to apply it. That case was concerned with a collateral attack on a conviction rather than one of direct appeal. While *Benton* v. *Maryland* did not expressly rule out for all purposes the concurrent sentence doctrine, it manifested such basic dissatisfaction with the doctrine as to suggest that its total elimination merely awaits a proper case. As both the majority and dissenting opinions in this case note, the Court in *Benton* said that "A stronger case for abolition of the concurrent sentence doctrine may well be made in cases on direct appeal as compared to convictions attacked collaterally by suits for post-conviction relief." 395 U.S. at 793, n. 11.

This case, coming as it does on direct appeal, and others like it, cry out for the doctrine's total abolition. Under the concurrent sentence doctrine prosecutors can join multiple defendants and multiple counts in cases which are supported (as this one was) by only marginal proof. The prosecutor then receives an unfair advantage on the trial

of the adverse effects on a jury of multiple criminal activity, and on appeal he has the advantage of employing the concurrent sentence doctrine to preserve convictions thus obtained. Total abolition of this doctrine will encourage prosecutors in the first instance to examine into their cases carefully and to include in their indictments only those charges which they believe to be supported by substantial evidence. Not only will abolition of the doctrine deprive the prosecution of this unfair advantage and encourage prosecutors to satisfy themselves as to the integrity of their own cases before presentment to a grand jury, but abolition of the doctrine will also ensure that district court judges carefully examine into defendants' motions for dismissal at the end of the Government's case. All too often these motions to dismiss are denied in a perfunctory manner without consideration, as was done here.

Accordingly, we believe that the important issues here involved should be decided by the Supreme Court to avoid fractional decisions on this issue by various appellate courts. At the time of the argument of the appeal, the consequences of an affirmance in part and reversal in part were not then present. Therefore, no in-depth consideration of this important issue was possible. We submit that Judge Hays' dissent captures the true spirit of the *Benton* rationale, namely, that abolition of the consecutive sentence doctrine requires a rule which provides that prejudice to a defendant will be presumed unless it is clearly shown that in fact no prejudice would result. There is an inherent prejudice, naturally caused by "spill over" of evidence from the counts presented unsupported by proof and by the fact that the Courts send evidence on such counts to juries giving them the right to find defendants guilty on the most tenuous evidence. Although the majority did not recognize the natural prejudice to the defendant in this case, one could hardly imagine a case where a defendant was more

prejudiced. The entire case was based on marginal evidence. Possession was the heart of the Government's case. The defendant was entitled, as the majority opinion admits, to a directed verdict of acquittal as to Counts 3 and 4; he was entitled to have this done before the jury, together with an instruction to the jury as to why it was being done. The Court could not have given a better instruction as to what possession really means in this kind of prosecution. The prosecutor was permitted to offer evidence of four sales of narcotics (Counts 1 through 4). The opinion of the Appellate Bench ruled that only one was supported by proof. The multiple counts permitted the prosecutor to argue in his summation that this was not an isolated instance, but that in fact Pego and Febre were partners in the retail business of selling narcotics. Certainly this picture, painted by the use of multiple counts unsupported by evidence, was prejudicial.

Although the majority, mindful of the strong warning in *Benton*, declared that they were not following the concurrent sentence doctrine, in effect they did so by refusing to reverse and remand. They refused to recognize the inherent prejudice to petitioner saying:

> ". . . we consider it highly unlikely that the evidence presented on the two counts we have reversed [3 and 4] . . . could have been mistakenly considered by the jury as tending to establish guilt under the second count of the indictment. Count two arose from a discrete series of events, transfer of the narcotics on February 20 and payment on February 23; none of the evidence presented on the other substantive crimes charged in the indictment related to events which occurred prior to March 8. . . ."

We submit that this is too narrow and scholastic a view to be satisfactory. Not only did the multiple counts permit

the prosecutor to paint a picture before the jury of expanded criminal activity, but the judge's charge encouraged, if not required, the jury to view the separate transactions together as a "joint undertaking" rather than a "discrete series of events." The judge charged the jury (erroneously, we believe, see POINT II, *infra*) that counts two, three and four of the indictment constituted a charge that Pego and petitioner were "engaged in a joint undertaking to violate the law as alleged in each of these counts."

Judge Hays, on the other hand, correctly assessed the natural prejudice resulting to petitioner and expressed that assessment as follows:

> "The effect to be given *Benton* must, it seems to me, require a change in our rule from one providing that in the case of concurrent sentences, the questioned conviction on one count will not be considered unless it can be shown that the defendant would be prejudiced if the conviction was unjustified, . . ., to one providing rather that prejudice will be presumed unless it is clearly shown that in fact no prejudice would result.
>
> "In the present case not only do I disagree with Judge Kaufman's view . . ., but I would go much farther than is suggested by Judge Kaufman's opinion and would remand for a new trial on the ground that the jury may well have been influenced with respect to counts two and five by 'spill over' of the evidence as to counts three and four, and by the fact that the court's sending the evidence on counts three and four to the jury gave to the jury the right to find appellant guilty on the most tenuous evidence.
>
> "We are quick to reverse a conviction on the ground of prejudice where evidence of defendant's commission of other crimes has been introduced. How can we consistently hold that the introduction of wholly in-

sufficient evidence of other crimes in the present case did not unfairly prejudice defendant's case?"

We urge this Court to grant this petition so that we may fully explore the items of prejudice which affect this petitioner and those like him as a result of the concurrent sentence doctrine.

II

The Court's erroneous charge and the Court's failure to charge regarding essential elements of the crime deprived petitioner of a fair trial.

We do not have here a case corrupted by passion and prejudice in the traditional sense, but we do have a case which runs directly to the question of what constitutes the substance of a fair trial. We adopt the arguments in POINT I of our petition in this POINT as well, and we add to that the claim that the massive legal errors in the Court's charge to the jury deprived the petitioner of a fair trial.

The Fifth and Sixth Amendments to the Constitution of the United States establish the right of every defendant in a federal criminal case to a fair trial. The simple rudiments of a fair trial require that a defendant ought not to be charged with multiple counts in an indictment which are patently unsupported by sufficient proof. In addition it has long been recognized that criminal statutes under which an accused may be brought to trial must be clear and concise and not vague and indefinite. Just as important is the requirement that a jury sitting in judgment of an accused must be instructed clearly and concisely as to each of the essential elements constituing the crimes charged against him. We believe that the Court's exposition of the

law to the jury was so massively inaccurate and confusing that the petitioner was deprived of a fair trial.

The essential elements supporting a charge under Title 21, §§ 173 and 174 are simple. They are:

1. That the appellant knowingly and wilfully concealed or sold or in any manner facilitated the transportation, concealment or sale or a narcotic drug;

2. That the substances in question are in fact narcotics;

3. That the narcotics were imported contrary to law; and

4. That the defendant knew that the narcotics in question have been illegally imported.

The Government's evidence in the case against petitioner wholly failed to meet its burden to prove these four essential elements beyond a reasonable doubt. This is especially true in regards to the third and fourth elements of the crime. It is conceded that the Government failed to offer any evidence that the heroin in question was imported contrary to law and that petitioner knew that the narcotics in question had been illegally imported. Instead, the heart of the Government's prosecution against petitioner consisted of an attempt by the Government to prove possession of the narcotics in question by petitioner and thereby trigger the powerful presumptions of guilt which flow from possession. It is conceded by the majority opinion that the Government totally failed to prove constructive possession in petitioner. But the Government argued, and the majority accepted, that as to one count in the indictment—count two—petitioner was shown to have actual possession. The affirmance of petitioner's conviction on count five—the conspiracy count—is based only upon the

finding of actual possession in petitioner on count two. As we have pointed out, counts three and four against petitioner were reversed on the grounds that there was no showing of possession in petitioner. Accordingly, in this marginal evidence case the Court's charge in relation to possession and the evidence which the jury may consider to find possession in petitioner and trigger the powerful presumption under § 174 was the heart of the matter of a fair trial.

A. The Court's Charge as to the Substantive Counts.

The Court below correctly instructed the jury that the Government was under the burden of proving beyond a reasonable doubt that each of the defendants knowingly and willfully concealed or sold or in any manner facilitated the transportation, concealment or sale of a narcotic drug which was illegally imported into the United States and that each defendant knew that the narcotics in question had been illegally imported. The Court's charge correctly recognized that the Government failed to offer any direct proof of two of the necessary elements, to wit, that the narcotic drug was illegally imported into the United States and that the defendants knew that it had been illegally imported. The Court went on to instruct the jury that this deficiency in direct proof could be cured if the jury found "beyond a reasonable doubt that a defendant knowingly had possession of a narcotic drug. . . ."

However, the Court followed this seemingly clear direction by giving the so-called "joint undertaking" or "common plan" instruction which has been condemned by appellate courts of various jurisdictions. The "joint undertaking" or "common plan" instruction allowed the jury to ignore the necessity of possession and find petitioner guilty as a participant in a common plan. Moreover, it allowed the jury to

impute to Febre the actual possession of Bless and Pego even when there was no independent evidence to justify a finding by the jury that petitioner had in fact a sufficient involvement in the transaction to constitute possession. The Court charged:

> "In determining the guilt or innocence of Febre on any of the counts which we have discussed so far you *must* consider the fact that the Government charges in Counts 2 and 3 of the indictment that Febre and Pego were engaged in a *joint undertaking* to violate the law as alleged in each of these counts. You *must* find beyond a reasonable doubt that Febre was so engaged with Pego as to each of these counts. *If you so find, then Febre is chargeable with the acts and statements of Pego which may be considered by you in determining the four elements of the crime in each count.*
>
> "Similarly as to Count 4 of the indictment, the government charges that Febre, Bless and Pego were engaged in a joint undertaking to violate the law as alleged in this count. You must find beyond a reasonable doubt that each defendant entered into such arrangement with each other and Pego. If you so find, *then each is chargeable with the acts and statements of the other, which may be considered by you in determining the four elements of the crime.*" (emphasis added)

Thus, the jury was erroneously led to believe that the incriminating acts of Pego, which clearly include the act of possession of heroin in each count of the indictment, could be imputed to petitioner in its determination as to whether or not the Government had proved the four elements of the crime (including possession) as against petitioner. In doing this the Court permitted the jury to erroneously activate the presumption of guilt. To the extent

that the opinion in the court below accepts the "joint undertaking" or "common plan" instruction, it represents a split in authority between it and several circuits, especially the Ninth and Fifth Circuits. *Hill* v. *United States*, 379 F.2d 811 (9th Cir. 1967); *Smith* v. *United States*, 385 F.2d 34 (5th Cir. 1967).

The Ninth Circuit in *Hill, supra*, condemned the "joint undertaking" or "common plan" instruction given by the trial court in this case. That instruction was indistinguishable in intent and almost identical in language to the objectionable portion of the district court's charge in the instant case. In *Hill* the Court charged:

> "If and when it appears from the evidence in the case that the common plan did exist and the defendant was one of the members then *the act thereafter knowingly done and the statements thereafter knowingly made by any person likewise found to be a member may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the acts and statements may have occurred* in the absence and without the knowledge of the defendant, provided such acts and statements were knowingly done and made during the continuance of such common plan and in furtherance of some object or purpose of the plan." *Id.* at n. 2 (emphasis added).

On appeal the Ninth Circuit held this portion of the Court's instructions to the jury to be in error:

> "Appellant has objected to the . . . 'common plan' instructions quoted in footnote 2. Under these instructions the jury was permitted to find the appellant guilty as . . . a participant in a common plan. . . . [A]s pointed out in Hernandez v. United States, 300 F.2d 114 (9th Cir. 1962), the fact that one is . . .

> a participant in a common plan is not enough to convict in a narcotics case unless he either knew that the narcotics had been unlawfully imported or *himself* had actual or constructive possession. In this case the instructions in reference to . . . 'common plan' should not have been given . . . ." *Id.* at 814. (emphasis added)

Thus, the trial court, having instructed the jury that the guilt of petitioner Febre could be established by a showing of constructive possession, erroneously went on to charge the jury that the fact of constructive possession could be imputed to the petitioner Febre from the acts and statements of his co-defendants. By receiving these instructions, the jury could ignore the fact that the Government failed in proving possession against Febre and was erroneously led to believe that they could charge Febre with possession by considering the evidence of possession against Bless and Pego under the "common plan" or "joint enterprise" instruction.

We maintained before the Court of Appeals that this instruction permitted the jury to find petitioner guilty on counts two, three and four on a mere finding that he was involved in a "joint undertaking" with Pego. As important, we maintained that this charge erroneously permitted the jury to impute to petitioner the possession of Pego. The majority opinion admitted the validity of the legal argument.

> "First, Febre argues that on count two of the indictment, the court's charge allowed the jury to impute to him the possession of narcotics by Pego.[5] Specif-

[5] Febre also directed his argument to similar instructions which related to counts three and four. Since we are reversing his convictions on these counts on other grounds, we need only concern ourselves with the effect of the charge on count two."

ically, the judge instructed the jury that if it found Febre to have been engaged with Pego in a joint undertaking to violate the law, 'then Febre is chargeable with the acts and statements of Pego which may be considered by you in determining the four elements of the crime in each count.' We agree with Febre that if this instruction had the effect of imputing the possession of his co-conspirators to him, his conviction on count two must be reversed, for '[p]ossession actual or constructive, must be shown with respect to each individual conspirator, facilitator, or aider and abettor.' *United States* v. *Hernandez*, 390 F.2d 86 (2d Cir. 1961); see *United States* v. *Santore*, 390 F.2d 51 (2d Cir. 1960) (Waterman and Friendly, *JJ.*). But we do not read the instruction as having had this effect. In our view, the instruction told the jury only that once it had found Febre and Pego to have been involved in a common criminal scheme, it could consider the acts and statements of Pego in determining whether Febre had himself possessed narcotics. We conclude this was not error."

* * *

The difficulty with the majority's reasoning is two-fold: (1) they failed completely to explain our contention that the Court's charge permitted the jury to find petitioner guilty merely on finding that he was a participant in a common plan, and (2) they ignored the literal words of the trial judge and held that those words did not have their literal *effect* upon the minds of the jury. They held rather that the jury understood something other than what the trial judge had said. Petitioner maintains that the proper question to be determined is whether or not the Court's literal language permitted the jury to do what they legally could not do. There are, of course, myriad permeations of the possible effects on the mind of a listener of any

statement. There is no basis whatsoever to support the mind-reading exercises of the majority in this case. All of the available evidence suggests that the jury did precisely what the judge told them they could do, namely, charge petitioner with the acts of possession of Pego in counts two, three and four and that they could find petitioner guilty on a mere finding that he was involved in a "joint undertaking" or "common plan."

The opinion of the Court found that there was no evidence of possession as to counts three and four. How then can we explain the conviction on counts three and four (reversed by the Court) except to say that they either charged petitioner with Pego's act of possession or found petitioner guilty on a mere showing of a "joint undertaking" or "common plan"? The difficulties with the majority's mind-reading exercises are readily apparent when compared with the decision of a different panel of Second Circuit judges in the separate opinion relating to petitioner's co-defendant Bless. As we pointed out earlier Bless' appeal was severed from petitioner's and was heard later by a different panel and received a different result. Under the Government's theory Bless was a more culpable defendant in that he was allegedly the wholesale supplier of the narcotics. His conviction under count four was reversed in part because of the judge's charge. The unanimous opinion reversing Bless' conviction had this to say about the confusing language complained of here. The Court said that,

> "... with respect to the charge against Febre, Bless and Pego in Count 4 '*each is chargeable with the acts and statements of the other, which may be considered by you in determining the four elements of the crime*' (Tr. 611). In discussing the Count 5 conspiracy charge, which remained against Febre, the court also read to

the jury overt act No. 3 to the effect that on April 5, 1967, in pursuance of the conspiracy, Bless, Febre and Pego met at 4271 Broadway, the address of the Bat Cave Bar & Grill (Tr. 617).

"The foregoing statements not only failed to exclude the evidence of the earlier transactions from consideration by the jury against Bless, *but could well have led the jurors to believe that they were entitled to consider it against him.*" (emphasis added)

B. The Court's Charge in Relation to the Conspiracy Count.

As we have already pointed out, the Government did not offer any evidence that the narcotics in question were illegally imported into the United States or that defendants, including petitioner, knew of the illegal importation. Instead, the Government chose to rely on possession in each individual defendant and the presumptions which flow therefrom. Accordingly, the element of possession was an essential element not only of the substantive crime but of the conspiracy charge under count five of the indictment. In order therefore for the Government to establish the crime of conspiracy it was under a burden to offer proof of possession with respect to each individual conspirator. *Smith* v. *United States*, 385 F.2d 34 (5th Cir. 1967); *Hernandez* v. *United States*, 300 F.2d 114 (9th Cir. 1962); *United States* v. *Hernandez*, 290 F.2d 86 (2d Cir. 1961); *United States* v. *Santore*, 290 F.2d 51 (2d Cir. 1960).

In *Hernandez* v. *United States*, 300 F.2d 114, 119 (9th Cir. 1962), the Court said:

"We are convinced . . . that an interpretation of the term 'possession' in section 174, which would include the possession of a third person, not on trial, with whom defendant has entered into a common scheme or plan or whom he has aided or abetted, but whose possession

of narcotic drugs he has neither shared nor controlled, would be inconsistent with the language, the structure and the purposes of the statute."

The second circuit in *United States* v. *Hernandez*, 290 F.2d 86 (2nd Cir. 1961) said:

"The cross-petition seeks clarification of the question whether or not possession of narcotics by the alleged co-conspirators is sufficient to permit application to appellant of the presumption of guilt which 21 U.S.C. §174 raises upon proof of possession.

* * * * *

"In *United States* v. *Santore*, 2 Cir., Nov. 16, 1960, 290 F.2d 51, a majority of this court on a rehearing *in banc* held . . . Since an aider and abettor must have the same knowledge and intent required of the principal, . . . proof of knowledge of illegal importation is also necessary to a conviction for aiding and abetting. This is pointed out in the opinions of Judges Waterman and Friendly in the *Santore* case, supra.

"Instead of proving the separate elements of 21 U.S.C. §174, including knowledge of importation, the prosecution may take advantage of the statutory presumption stated in the statute thus: 'Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.' Thus a person who facilitates, aids or abets, *or conspires* in violation of 21 U.S.C. §174, *and who can be shown to have had possession of the drug*, can be convicted without independent proof of knowledge of illegal importation." *Id.* at 89. [Emphasis added]

Petitioner was entitled to an accurate charge in relation to the conspiracy count. He did not receive it. After instructing the jury in the confusing terms of "joint undertaking" in the substantive charge, the Court gave an erroneous charge in relation to the conspiracy charge. The Court failed to specifically instruct the jury that the same evidence of intent or knowledge is required to convict conspirators as is required to convict those charged with the substantive offense. The Court failed to adequately emphasize to the jury that in order to convict petitioner Febre under the conspiracy charge the Government must prove that petitioner Febre had possession of the narcotics which was the subject of the conspiracy. As a matter of fact, the judge totally failed to instruct the jury of the necessity of finding possession in petitioner in order to support a conviction under a conspiracy to violate Title 21, §§ 173 and 174. The appellate court held, however, that the trial court's failure even to mention possession in its charge on the conspiracy count was not error because the trial court had referred to the element of possession in its earlier charge on the substantive count. This ruling is directly opposed to the ruling in *United States* v. *Messiah*, 307 F.2d 62 (2d Cir. 1962), *rev'd on other grounds*, 377 U.S. 201, 84 S.Ct. 1199 (1969).

In a criminal case the defendant is entitled to have the jury instructed on all the elements that must be proved to establish a crime charged. *United States* v. *Gillilan*, 288 F.2d 796 (2d Cir.) *cert. denied*; *Apex Distributing Co.* v. *United States*, 368 U.S. 821 (1961); *United States* v. *Messiah*, *supra*. "[T]he omission to charge an element of the offense has been held by this court to be plain error . . . requiring reversal even if the point was not raised below." *Screws* v. *United States*, 325 U.S. 91 (1945). In *United States* v. *Messiah*, *supra*, the trial judge did precisely what the trial court did here, namely, left out the essential element of possession in his charge on a conspiracy count

under § 173. In *Messiah* the argument was identical, namely, that the conspiracy charge was saved by the court's earlier recital of the elements of § 173. That argument was dispensed with by Judge Hays as follows:

> "Judge Waterman and I find no justification in law or logic for the assertion that this charge was saved by the court's earlier recital of section 173 or by the proper charge on the count charging Massiah with a substantive violation of sections 173 and 174 of Title 21. In view of the charge as a whole, in which the essential elements of each offense were carefully enumerated for the jury, it must be assumed that the jury relied on the court's listing of the elements, and did not consider additional elements provided by their own interpretation of the elements involved in a conspiracy violation of section 174, a question so complex that it has recently evenly divided this court. *United States* v. *Santore*, 290 F.2d 74 (2d Cir. 1960) (*in banc*). Considering the charge as a whole, Judge Waterman and I are convinced that the jury could not have had the slightest idea that they must find knowledge of importation in order to convict under the conspiracy count."

There was another fatal error in the Court's conspiracy charge which was not considered at the time of argument and which makes the absence of an instruction as to possession fatal. The Court charged in part as follows:

> "Second that it was part of the conspiracy to do any one of the following: That the defendant Febre unlawfully, wilfully and knowingly would receive, conceal, sell . . . a quantity of narcotic drugs. . . .
>
> * * *
>
> "Once you have determined that the offense has been established under the guidelines I have just given you,

> then the conspiracy is complete as to every person found by you to have been knowingly and wilfully a member of the conspiracy regardless of which of the conspirators did the overt act. *Furthermore, at this point the success or failure of the conspiracy to accomplish the common object or purpose is immaterial.*"

Of course, in a conspiracy to possess, etc., narcotics, the object of the conspiracy at least as far as possession is concerned must be complete as to each individual conspirator. The rule is clear that in a case such as this, possession is necessary to convict a conspirator. It is conceded by all that in this case there was no evidence offered of knowledge of illegal importation. The Court's ruling that the charges here complained of were not error flies in the face of *Santore* and *Hill, supra;* and *United States* v. *Jones,* 308 F.2d 26 (2nd Cir. 1962).

Under the "joint undertaking" instruction which grouped counts two and three together and was repeated in count four, and the conspiracy instruction which failed to mention the essential elements of possession, and erroneously indicated to the jury that possession was not even necessary, this jury could not have had the slightest idea that they must find possession in each individual defendant in order to convict. They could not have had the slightest idea that the Government was under the burden to prove possession in Febre individually.

III

The petitioner was deprived of a fair trial since the jury was permitted to trigger the presumption of guilt without a sufficient showing of possession of narcotics in petitioner.

Judge Kaufman accurately set forth the issues. He stated that in order to convict a defendant for the concealment or transportation of illegally imported narcotics under 21 U.S.C. § 174, the Government must prove that he knew the narcotics to be illegally imported. Since this subjective element of knowledge is often difficult to establish by direct evidence, the government generally relies upon the presumption contained in §174, which provides that unexplained possession of narcotics shall be deemed sufficient evidence of knowledge of illegal importation. In this case we are called upon to resolve several questions concerning the employment of this presumption: whether the prosecution offered evidence of possession sufficient to invoke the presumption, whether the court properly instructed the jury on its consideration of the presumption.

I. *Facts*

At approximately 9 o'clock on the evening of February 20, 1967, an unnamed informant employed by the Federal Bureau of Narcotics placed a telephone call to Joseph Pego.[1] Clarence Cook, a Special Agent of the Bureau, who had once previously purchased narcotics from Pego, monitored that call. The informant told Pego that Cook wished to purchase an ounce of heroin. Pego replied that he did not have this amount of heroin and would have to get it. He

[1] Joseph Pego was charged as a co-defendant in the indictment. Shortly after trial he elected to plead guilty to all five counts of the indictment; he did not testify at trial.

directed Cook and and the informant to proceed to the informant's residence where he would telephone them when he had obtained the heroin.

Twenty minutes after he received the call, Pego left his residence in the Bronx and proceeded by taxi to the Bat Cave Bar in Manhattan. Pego arrived at the Bat Cave at 9:35, ordered a drink, and then walked to the back of the bar where he talked with a group of customers who were playing pool. At 10:15 appellant Ralph Febre entered the bar and talked briefly with Pego. After five minutes, Febre and Pego left the Bat Cave together and continued their conversation in Febre's car, which was parked in front of the bar. Just before 10:30, Pego returned to the bar alone, then immediately telephoned the informant to tell him that "he had the stuff" and would deliver it to Cook at the corner of 170th Street and Jerome Avenue in half an hour. Pego then returned to the car and drove off with Febre, who dropped him at the corner where the sale was to occur. When Cook arrived, Pego gave him an ounce of heroin and received, in return $50 Cook owed for a previous purchase and $1200 of the $1400 price of the ounce.

Agent Cook arranged to pay the remaining $200 to Pego on February 23, 1967 at the corner of 57th Street and 9th Avenue. Pego was driven to the meeting place by Febre. Febre remained in his car while Pego left Febre's car, walked down the block and entered Agent Cook's car. A few moments later he returned to Febre's car where he was seen giving some money to Febre. This series of events formed the basis of count two of the indictment, the first substantive offense with which Febre was charged.

The Government defaulted in offering any proof on any count of illegal importation and the knowledge thereof. Instead it chose to rely on possession. The majority opinion

admits that the Government failed to make a case of constructive possession. Therefore, the Government's case depends upon proof of actual possession by petitioner sufficient to trigger the presumption. The Appellate Court spelled out actual possession in petitioner as to count two only. Analysis of the Court's opinion, however, shows that the majority actually did what they admit can not be done, namely, they imputed the possession of Pego to petitioner. They found possession in petitioner by the incriminating acts of Pego rather than the unequivocable and incriminating acts of petitioner. The majority opinion, based upon the foregoing facts, states:

> "*Pego's* entire course of conduct on this occasion leads one to the reasonable conclusion that he had arranged to have the narcotics requested by Agent Cook delivered to the Bat Cave Bar. The jury could also fairly and reasonably have concluded that Febre had personally delivered the ounce of heroin to Pego and accordingly had actually possessed it."

Thus the majority argued that from Pego's behavior the jury could fairly and reasonably have concluded that Febre had personally delivered the ounce of heroin to Pego and therefore had actually possessed it. There is, of course, an enormous hole in this logic. Pego was in the bar some 40 or 45 minutes before Febre arrived; he mingled about with various patrons; any one could have handed him the package of heroin. Actually, he could have had the heroin with him all the time and was seeking to confuse Agent Cook. It is true that Febre entered the bar some 45 minutes after Pego, but there was no exclusionary evidence negating the fact that other people may have entered the bar at or about the same time. It is true that shortly after Febre entered the bar, he chauffeurred Pego to the vicinity of Agent Cook, but he merely dropped him off there and went on his way.

There is no substantial proof that Febre delivered the narcotics on February 20, 1967. At best, the majority's conclusion is based on conjecture and surmise and in effect nullifies the prior holdings which requires independent proof of possession in each defendant. In *Jensen* v. *United States*, 403 F.2d 1018 (9th Cir. 1968), that Court was faced with infinitely stronger circumstantial evidence of possession. Smith, the counterpart of Pego in our case, stated to the agent buyer that he had to get the heroin from a man parked across the street in a Hillman automobile [Jensen]. The agent observed Smith walk directly over to the grey Hillman automobile and return from it and deliver a quantity of heroin to him. Smith indicated that Jensen was his connection. The Ninth Circuit reversed the conviction of Jensen because the illicit activity of Smith was not sufficient to charge Jensen with possession.

> ". . . Smith could have procured the heroin elsewhere and so conducted the sale by contacting Jensen as to make him appear to be the supplier.
>
> "The evidence against Jensen is that he was in contact with Smith on two occasions shortly before each sale from Smith to the federal agent. We can surmise—we can conjecture—but we cannot find substantial proof either of sale or possession by Jensen."

The case at hand is infinitely weaker. There was no statement by Pego that Febre was his supplier and there were numerous opportunities for other people to have supplied Pego with the heroin, or for that matter Pego could have possessed the heroin all the time.

Moreover, the events of Count 3 which the Court reversed are almost indistinguishable from the events surrounding Count 2. Cooke asked Pego for a sample. Pego told Cook

to go to 171st Street and Grand Concourse and he, Pego, in the meantime would go and procure a sample and deliver it to him there. Pego then left Cook and walked to 1551 Walton Avenue where he entered the building. Approximately 45 minutes later, Pego left the building together with Febre. They spoke briefly and separated. Pego then went immediately to 171st Street and Grand Concourse where he delivered the sample to Agent Cook. The Court reversed on this count, holding the evidence of possession to be insufficient, saying:

> "Even if the jury had concluded that Febre and Pego had been in the same apartment, it had no way of knowing whether Febre actually handed the sample over to Pego, whether someone else who may have been in the apartment did so, whether Pego obtained the sample himself from a stock of heroin he knew to be in the apartment . . . or whether Pego had the sample in his possession when he had spoken with Cook earlier. . . . The inferences required to support a finding of actual possession on this count rest on too tender a reed."

We believe that the same tender reed supports Count 2 and it is also too tender to trigger the presumption. As to Count 2, the jury had no way of knowing whether Febre actually handed the heroin over to Pego, whether someone else who was in the bar or entered together with Febre did so, or whether Pego had the sample in his possession.

It is obvious that the majority opinion is inconsistent with the Ninth Circuit's view on the quality and quantity of evidence of possession necessary to trigger the presumption. Indeed, this problem has bothered appellate courts for quite some time and the need for a definitive ruling by this Court was best expressed in *Hernandez v. United States*, 300 F.2d 114 (9th Cir. 1962):

"The term must be defined with precision and restraint for in effect we are defining the basis upon which punishment will be imposed. It is well to be reminded too that the term possession is a highly ambiguous one in the law and hence 'so fraught with danger that the courts must scrutinize its use with all diligence'. . . ."

CONCLUSION

The concurrent sentence doctrine is unfair and should be abolished. The Court's "common plan" and "joint undertaking" charged in regards to the substantive count was erroneous. The Court's failure to charge the necessity of possession in regards to the conspiracy count was erroneous. The Court's charge in regards to the substantive and conspiracy counts was deficient and deprived the petitioner of a fair trial. The evidence offers only conjecture and surmise and fails to define petitioner's involvement with sufficient clarity to charge him with possession of a narcotic drug and to trigger the presumption under §§ 173 and 174.

For the foregoing reasons the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 329—September Term, 1969.

(Argued November 10, 1969 Decided January 8, 1970.)

Docket No. 33241

UNITED STATES OF AMERICA,

Appellee,

—v.—

RALPH FEBRE,

Appellant.

Before:

MOORE, KAUFMAN and HAYS,

Circuit Judges.

Appeal from a judgment of conviction in the United States District Court for the Southern District of New York before Judge Charles M. Metzner and a jury for violations of 21 U.S.C. §§ 173, 174 and for conspiracy to violate 21 U.S.C. §§173, 174. Affirmed in part; reversed in part.

JOSEPH J. MARCHESO, New York, N. Y. (David Wallenstein and Bauman & Marcheso, New York, N. Y., on the brief), *for appellant.*

DANIEL J. SULLIVAN, Assistant United States Attorney, New York, N. Y. (Robert M. Morgenthau, United States Attorney, and David A. Luttinger, Assistant United States Attorney, New York, N. Y., on the brief), *for appellee.*

KAUFMAN, *Circuit Judge*:

In order to convict a defendant for the concealment or transportation of illegally imported narcotics under 21 U.S.C. §174, the government must prove that he knew the narcotics to be illegally imported. Since this subjective element of knowledge is often difficult to establish by direct evidence, the government generally relies upon the presumption contained in §174, which provides that unexplained possession of narcotics shall be deemed sufficient evidence of knowledge of illegal importation. In this case we are called upon to resolve several questions concerning the employment of this presumption: whether the prosecution offered evidence of possession sufficient to invoke the presumption, whether the court properly instructed the jury on its consideration of the presumption, and, finally, whether the Constitution prohibits the application of the presumption in cases involving the transportation of heroin.

I. *Facts*

At approximately 9 o'clock on the evening of February 20, 1967, an unnamed informant employed by the Federal Bureau of Narcotics placed a telephone call to Joseph Pego.[1]

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[1] Joseph Pego was charged as a co-defendant in the indictment. Shortly after trial he elected to plead guilty to all five counts of the indictment; he did not testify at trial.

Clarence Cook, a Special Agent of the Bureau, who had once previously purchased narcotics from Pego, monitored that call. The informant told Pego that Cook wished to purchase an ounce of heroin. Pego replied that he did not have this amount of heroin and would have to get it. He directed Cook and the informant to proceed to the informant's residence where he would telephone them when he had obtained the heroin.

Twenty minutes after he received the call, Pego left his residence in the Bronx and proceeded by taxi to the Bat Cave Bar in Manhattan. Pego arrived at the Bat Cave at 9:35, ordered a drink, and then walked to the back of the bar where he talked with a group of customers who were playing pool. At 10:15 appellant Ralph Febre entered the bar and talked briefly with Pego. After five minutes, Febre and Pego left the Bat Cave together and continued their conversation in Febre's car, which was parked in front of the bar. Just before 10:30, Pego returned to the bar alone, then immediately telephoned the informant to tell him that "he had the stuff" and would deliver it to Cook at the corner of 170th Street and Jerome Avenue in half an hour. Pego then returned to the car and drove off with Febre, who dropped him at the corner where the sale was to occur. When Cook arrived, Pego gave him an ounce of heroin and received in return $50 Cook owed for a previous purchase and $1200 of the $1400 price of the ounce.

Agent Cook arranged to pay the remaining $200 to Pego on February 23, 1967 at the corner of 57th Street and 9th Avenue. Pego was driven to the meeting place by Febre, to whom he handed a "wad of money" after he had received payment from Cook. This series of events formed the

basis of count two of the indictment, the first substantive offense with which Febre was charged.[2]

Cook and Pego met once again at the corner of 170th Street and Jerome Avenue on the evening of March 8. At this time Cook complained about the quality of the heroin he had purchased, and after discussion, it was agreed that Pego would provide Cook with a sample before Cook made further purchases and that this sample would be delivered later that evening. Pego proceeded to 1551 Walton Avenue where he entered Apartment 5B, the residence of Ralph Febre's brother Joseph. Five minutes later he was observed leaving the building in the company of Ralph Febre. He then left Febre and delivered the sample to Cook himself.

Cook apparently considered the sample satisfactory for five days later he negotiated with Pego for the purchase of a quarter kilogram of heroin. Pego set the price at $8700 and promised to deliver the "quarter" within forty-five minutes. After a visit to Apartment 5B at 1551 Walton Avenue Pego returned to the place where Cook was waiting to inform him that there would be a delay. Pego then returned to 1551 Walton Avenue. Two hours later Ralph Febre also entered the building. After fifteen minutes, Pego emerged, returned to Cook, and told Cook that "his people were unable to get the half a kilogram [from which Cook's 'quarter' was to come] and to see him in a couple of weeks." Count three of the indictment arose out of these facts.

Cook did see Pego again three weeks later. On this occasion, April 4, 1967, it was agreed that on the following evening Pego would provide Cook with the quarter kilogram of heroin he had previously been unable to obtain.

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[2] Count one of the indictment arose out of an earlier sale of narcotics to Cook by Pego. Pego was the only defendant named in this count.

The next evening, after directing Cook to await delivery at the Port Authority Bus Terminal at 178th Street and Broadway, Pego joined Febre and one Edward Bless, named as a defendant in Count Four, at the Bat Cave Bar. After ascertaining that Pego had seen Cook, Febre asked, "What does he want?" When Pego replied "a quarter" Febre turned to Bless and asked "if he could handle it." Bless said that he could and that it would take about forty-five minutes. A few minutes later he left the bar. After Bless' departure, Febre and Pego continued their conversation which centered on experiences in the Armed Forces. At one point in the conversation, however, Febre remarked, "Things were going to be much better now that Willy was dead because Eddie was a much better guy to get along with."

One hour after he had left the bar, Bless returned and told his colleagues, "It can't be done tonight. It has to be tomorrow." Although Febre seemed to object to this statement Bless apparently prevailed, and the sale did not occur until the next afternoon, April 6. These events gave rise to the fourth count of the indictment.

Pego was arrested as he transferred the quarter kilogram of heroin to Cook on April 6. Subsequently both Bless and Febre were also arrested. On November 1, 1968, following a five-day trial before Judge Metzner and a jury Febre was convicted of the substantive crimes set forth in counts two through four of the indictment and also for conspiring with Pego and Bless to violate §174, the charge contained in Count Five of the indictment.[3] Judge Metzner sentenced him to four concurrent six-year sentences.

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[3] As we have stated, *see* note 1, Pego entered a plea of guilty to all five counts of the indictment. He received five concurrent five-year sentences. Bless was convicted on count four and sentenced to imprisonment for seven years.

II. *Possession*

Febre concedes that the evidence presented by the government sufficed to prove that he had facilitated the transportation of heroin. However, he contends that the prosecution failed to show that he knew this heroin to have been illegally imported, an essential element of the crimes for which he was charged and convicted. Admittedly, there was no direct evidence of knowledge of illegal importation. But Febre also claims that the government's proof failed to show that he ever "possessed" the heroin, and accordingly that the statutory presumption of knowledge of illegal importation was inapplicable.

Although the law is established that the "possession" required to invoke the presumption need not be actual physical custody of narcotics, we believe it appropriate to begin our analysis with a consideration whether the jury could properly have found that Febre physically possessed the heroin involved in the charges against him. Viewing the evidence in a light most favorable to the government, as we are required to do on this appeal from the conviction, we conclude that the evidence on count two supports an inference that Febre actually possessed the heroin Pego sold to Cook on February 20, 1967.[4] We recall that on February 20 Cook made known his desire to purchase an ounce of heroin. At the time Cook made this request, Pego stated that he did not have the heroin and would telephone Cook as soon as he obtained it. Pego then spent approximately thirty minutes at the Bat Cave Bar talking with several patrons. At no time during this period did he

[4] The permissible finding of possession of the narcotics involved in count two of the indictment also suffices to establish the possession necessary to Febre's conviction for conspiracy to violate §174. Accordingly, his conspiracy conviction on count five is affirmed.

attempt to contact Cook. However, the evidence reveals that as soon as he had finished speaking with Febre, who had arrived at the bar in his own car and in which he was the sole occupant, Pego immediately informed Cook that he now had the "stuff." Febre and Pego then proceeded to the place where the sale occurred in Febre's car. Pego's entire course of conduct on this occasion leads one to the reasonable conclusion that he had arranged to have the narcotics requested by Cook delivered to the Bat Cave Bar. The jury could also fairly and reasonably have concluded that Febre had personally delivered the ounce of heroin to Pego and accordingly, had actually possessed it.

On counts three and four, however, the evidence of actual possession was far weaker, indeed almost nonexistent. The only heroin involved in the transaction which gave rise to count three was the small sample, a quantity of little more than one gram, which Pego delivered to Cook on the evening of March 8. Febre's only and tenuous connection with this sample was that he was seen emerging from an apartment building with Pego when Pego was on his way to deliver the sample to Cook. Since his entry into the apartment building apparently preceded that of Pego (Febre was not seen entering), Febre could not be charged with personally having transported the sample to the apartment at Pego's request. Even if the jury had concluded that Febre and Pego had been in the same apartment, it had no way of knowing whether Febre actually handed the sample over to Pego, whether someone else who may have been in the apartment did so, whether Pego obtained the sample himself from a stock of heroin he knew to be in the apartment or somewhere else in the building, or whether Pego had the sample in his possession when he had spoken with Cook earlier and had returned to the apartment only to inform others who may have been involved in the con-

spiracy of his arrangements with Cook. The inferences required to support a finding of actual possession on this count rest on too tender a reed. There was also no evidence whatsoever to suggest that Febre had actually possessed the quarter kilogram of heroin which Pego transferred to Cook on April 6 and which formed the basis for count four. Moreover, viewing the evidence as a whole, we see no pattern of conduct which could justify a conclusion that Febre invariably acted as a messenger who transported heroin from Bless, the wholesale dealer, to Pego, the street peddler. To be sure, Febre apparently did perform such a function on February 20, but the conversation among all three co-defendants on April 5 reveals that Bless also had direct dealings with Pego. We therefore conclude that, with respect to counts three and four, the government failed to prove that Febre had actually possessed the heroin involved in the transactions which gave rise to those counts.

We do not mean to suggest from the foregoing discussion that proof of actual physical custody of narcotics is necessary to invoke the presumption; a showing of constructive possession through the exercise of dominion and control over narcotics will also suffice. *United States* v. *Jones*, 308 F.2d 26, 30 (2d Cir. 1962) (*en banc*). In *Jones* we reaffirmed an earlier decision that "one having a working relationship or a sufficient association with those having physical custody of the drugs so as to enable him to assure their production, without difficulty, to a customer as a matter of course may be held to have constructive possession," 308 F.2d at 30; see *United States* v. *Hernandez*, 290 F.2d 86 (2d Cir. 1961). We also set forth several indicia of constructive possession: "Properly admitted evidence showing that a given defendant set the price for a batch of narcotics, had the final say as to means of transfer, or was

able to assure delivery, may well be sufficient to charge the defendant with a constructive possession of the narcotics . . . ." 308 F.2d at 31. Since our decision in *Jones*, in all of the cases in which we have upheld a finding of constructive possession at least one of these indicia has been present. See, e.g., *United States* v. *Lopez*, 355 F.2d 250 (2d Cir. 1966); *United States* v. *Rivera*, 346 F.2d 942 (2d Cir. 1966); *United States* v. *Carter*, 320 F.2d 1 (2d Cir. 1963); *United States* v. *Douglas*, 319 F.2d 526 (2d Cir. 1963); *United States* v. *Ramis*, 315 F.2d 437 (2d Cir. 1963).

In this case, none of the factors which have led us to find constructive possession in the past are present. Febre did not set the price or arrange the means of transfer for any of the heroin Pego sold to Cook; nor was he able to assure delivery. Indeed, the evidence indicated that Pego negotiated the price himself, allowed Cook to defer payment himself, and set the time and place of transfer himself. Although the conversation of April 5 shows Febre to have been deeply involved in an ongoing conspiracy to sell heroin, it also reveals that he was utterly unable to assure the prompt delivery of narcotics to prospective customers. When Bless expressed his inability to fill the order for a quarter kilogram of heroin that evening, Febre had no recourse but to express his irritation and to accept a delay until the following day.

For these reasons we conclude that Febre cannot be found actually or constructively to have possessed the narcotics which led to his convictions on counts three and four of the indictment.

III. *Instructions*

Febre contends that the court's charge was erroneous for two reasons, both of which relate to the issue of possession. First, Febre argues that on count two of the in-

dictment, the court's charge allowed the jury to impute to him the possession of narcotics by Pego.[5] Specifically, the judge instructed the jury that if it found Febre to have been engaged with Pego in a joint undertaking to violate the law, "then Febre is chargeable with the acts and statements of Pego which may be considered by you in determining the four elements of the crime in each count." We agree with Febre that if this instruction had the effect of imputing the possession of his co-conspirators to him, his conviction on count two must be reversed, for "[p]ossession, actual or constructive, must be shown with respect to each individual conspirator, facilitator, or aider and abettor." *United States* v. *Hernandez*, 390 F.2d 86 (2d Cir. 1961); see *United States* v. *Santore*, 390 F.2d 51 (2d Cir. 1960) (Waterman and Friendly, *JJ.*). But we do not read the instruction as having had this effect. In our view, the instruction told the jury only that once it had found Febre and Pego to have been involved in a common criminal scheme, it could consider the acts and statements of Pego in determining whether Febre had himself possessed narcotics. We conclude this was not error.

Febre's other claim is that the court failed to instruct the jury that a finding of possession was just as necessary for a conviction on the conspiracy count as for a conviction on the substantive counts. We do not believe that the court's failure specifically to mention possession in its charge on the conspiracy count was erroneous. The judge clearly charged the jury that to convict Febre for conspiracy to violate §174 it must find that he conspired to facilitate the transportation of narcotics which he knew to

[5] Febre also directed his argument to similar instructions which related to counts three and four. Since we are reversing his convictions on these counts on other grounds, we need only concern ourselves with the effect of the charge on count two.

have been illegally imported. By reference to the charge on the substantive counts, the jury must have been aware that it could base this finding of knowledge of illegal importation only on direct evidence of knowledge or on proof of possession sufficient to invoke the statutory presumption of knowledge.

IV. *Constitutionality of the Presumption*

The Supreme Court has declared the constitutionality of the §174 presumption of knowledge of illegal importation arising out of possession in *Yee Hem* v. *United States*, 268 U.S. 178 (1925). In *Leary* v. *United States*, 395 U.S. 6 (1969), a case in which the Supreme Court held a similar presumption relating to marijuana unconstitutional, the Court intimated "no opinion whatever about the continued validity of the presumption relating to 'hard' narcotics [the §174 presumption]." 395 U.S. at 37 n. 92. The basis for the Court's action on marijuana was evidence that very significant amounts of marijuana were grown in the United States; we have been directed to no evidence which suggests that significant quantities of heroin are manufactured illegally in this country. Indeed we have held on several occasions that the presumption of knowledge of illegal importation arising out of the possession of heroin survives the Supreme Court's decision in *Leary*. See *United States* v. *Malo*, Docket No. 33484 (2d Cir. September 9, 1969); *United States* v. *Cuadrado*, Docket No. 33336 (2d Cir. July 15, 1969); *United States* v. *Bennett*, 409 F.2d 888 (2d Cir. 1969).

V. *Disposition of This Appeal*

Because the evidence was insufficient to support a finding that Febre possessed the narcotics which led to his convictions on counts three and four of the indictment, we

conclude that his convictions on these two counts must be reversed. Until recently we could confidently have ended our inquiry with the conclusion that Febre's conviction on count two was supported by sufficient evidence. Since Febre received four concurrent sentences, if we were to apply the concurrent sentence doctrine we would not be required to reach his objections to his convictions on counts three and four. See *Hirabayashi* v. *United States*, 320 U.S. 81 (1943). Last Term, however, in *Benton* v. *Maryland*, 395 U.S. 784 (1969), the Supreme Court declined to apply the concurrent sentence doctrine and suggested that there was no "satisfactory explanation" for its existence. 395 U.S. at 789. In declining to apply the doctrine, the Court was concerned that convictions which the principle precluded from being reviewed could later have undesirable collateral consequences for defendants. As we read *Benton* the doctrine may still be employed if it is reasonable to conclude in the particular case that no undesirable collateral consequences would flow from its application. In fact, we have applied the concurrent sentence doctrine in a case decided after *Benton*. See *United States ex rel. Weems* v. *Follette*, 414 F.2d 417 (2d Cir. 1969). But *Weems* was a collateral attack on a conviction rather than a direct appeal, and the Court remarked in *Benton* that a "stronger case for total abolition of the concurrent sentence doctrine may well be made in cases on direct appeal." 395 U.S. at 793 n. 11.

Although in this case we have determined not to apply the concurrent sentence doctrine and, instead, to reverse Febre's convictions on counts three and four, we see no reason to vacate the convictions and remand for a new trial on the other two counts. Mindful of the *Benton* rationale, we consider it highly unlikely that the evidence presented on the two counts we have reversed could have

been mistakenly considered by the jury as tending to establish guilt under the second count of the indictment. Count two arose from a discrete series of events, transfer of the narcotics on February 20 and payment on February 23; none of the evidence presented on the other substantive crimes charged in the indictment related to events which occurred prior to March 8. Furthermore, the testimony on the reversed counts would have been before the jury even had these counts been dismissed, for all of this evidence tended to show the existence of the conspiracy charged in count five. For this reason, we consider inapposite the analogy drawn by our brother Hays between this evidence and inadmissible evidence of other crimes.

Neither do we discern any cause to remand for resentencing, as we have done on occasions where the convictions on the reversed counts may have affected the sentences imposed on the remaining counts. See *United States* v. *Hines*, 256 F.2d 561 (2d Cir. 1958). Since Febre's six-year sentence was only one year longer than the statutory minimum, we believe it unlikely that resentencing would result in a reduced sentence. Strong evidence that the number of counts on which each defendant was convicted had no influence on the court's decision on sentencing buttresses this conclusion. Pego, convicted on all five counts of the indictment, was sentenced to only five years' imprisonment; Bless, convicted only on the fourth count, received a seven-year sentence.

The convictions on counts two and five of the indictment are affirmed and those on counts three and four reversed.

HAYS, *Circuit Judge* (dissenting):

I agree with Judge Kaufman that the conviction on counts three and four must be reversed. I disagree on the consequences of that reversal. In my opinion the case should be remanded for a new trial on counts two and five.

While *Benton* v. *Maryland* does not expressly rule out for all purposes the concurrent sentence doctrine, it manifests such basic dissatisfaction with the doctrine as to suggest that its total elimination merely awaits a proper case. And, as Judge Kaufman notes, the Court in *Benton* says that "A stronger case for abolition of the concurrent sentence doctrine may well be made in cases on direct appeal, as compared to convictions attacked collaterally by suits for post conviction relief." 395 U.S. at 793, footnote 11.

The effect to be given *Benton* must, it seems to me, require a change in our rule from one providing that in the case of concurrent sentences, the questioned conviction on one count will not be considered unless it can be shown that the defendant would be prejudiced if the conviction was unjustified, see *United States* v. *Barash*, 365 F.2d 395 (2d Cir. 1966), to one providing rather that prejudice will be presumed unless it is clearly shown that in fact no prejudice would result. See *United States ex rel. Weems* v. *Follette*, 414 F.2d 417 (2d Cir. 1969).

In the present case not only do I disagree with Judge Kaufman's view that a lighter sentence could not possibly result from a remand for resentencing, but I would go much farther than is suggested by Judge Kaufman's opinion and would remand for a new trial on the ground that the jury may well have been influenced with respect to counts two and five by "spill over" of the evidence as to counts three and four, and by the fact that the court's sending the evidence on counts three and four to the jury gave to the

jury the right to find appellant guilty on the most tenuous evidence.

We are quick to reverse a conviction on the ground of prejudice where evidence of defendant's commission of other crimes has been introduced. How can we consistently hold that the introduction of wholly insufficient evidence of other crimes in the present case did not unfairly prejudice defendant's case?

No. 33240-1

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

EDWARD BLESS, RALPH FEBRE, AND JOSEPH PEGO,

Defendants,

EDWARD BLESS AND RALPH FEBRE,

Defendants-Appellants.

A petition for rehearing having been filed herein by counsel for defendant-appellant, Ralph Febre,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

I dissent and vote
to grant.
PRH

/s/ LEONARD P. MOORE
Leonard P. Moore

/s/ IRVING R. KAUFMAN
Irving R. Kaufman

/s/ PAUL R. HAYS
Paul R. Hays

May 1, 1970

No. 33240-1

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

EDWARD BLESS, RALPH FEBRE, AND JOSEPH PEGO,

Defendants,

EDWARD BLESS AND RALPH FEBRE,

Defendants-Appellants.

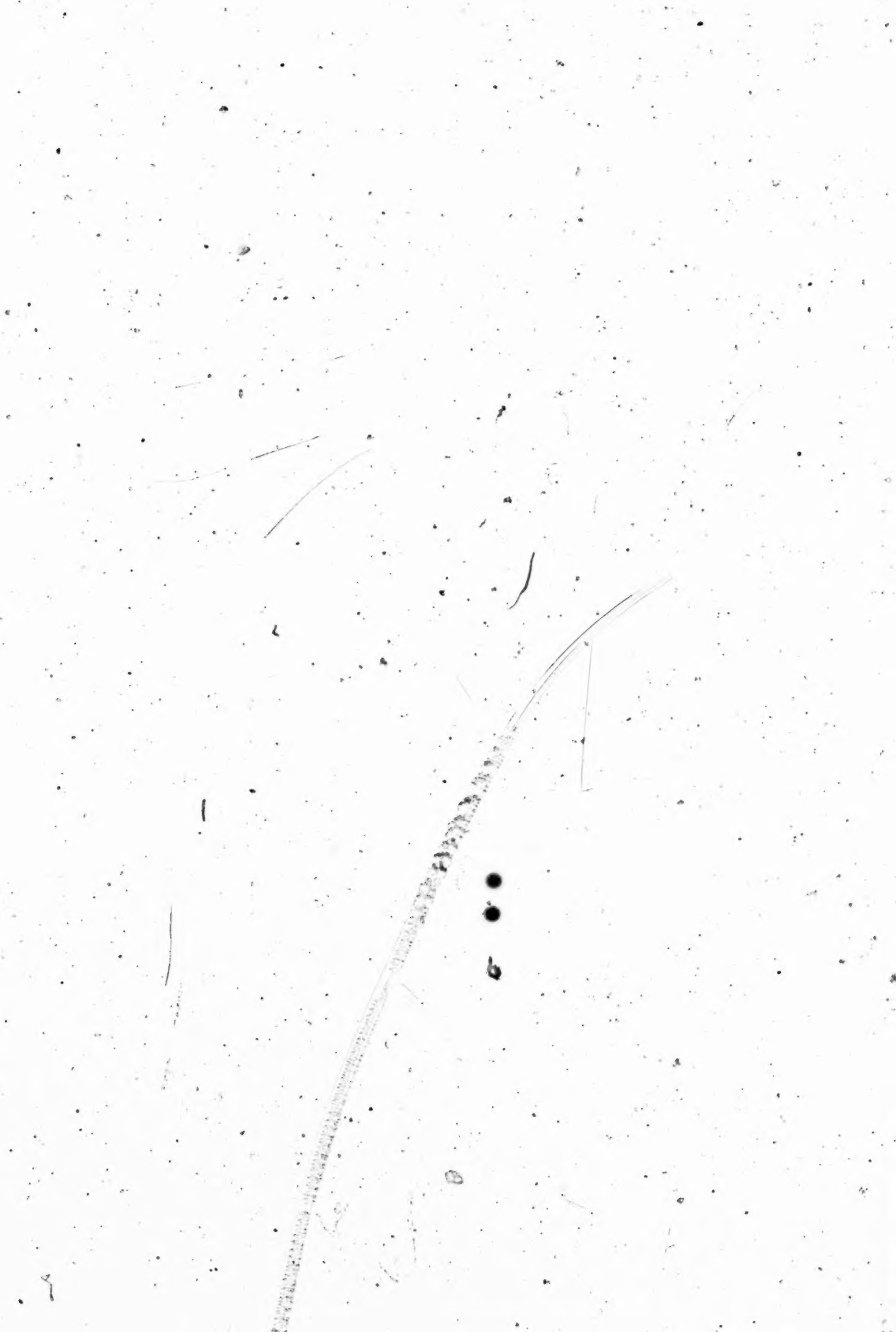
A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Ralph Febre, and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD
Chief Judge

May 1, 1970



APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 328—September Term, 1969.

(Submitted January 7, 1970 Decided February 6, 1970.)

Docket No. 33240

UNITED STATES OF AMERICA,

Appellee,

—v.—

EDWARD BLESS,

Appellant.

Before:

LUMBARD, *Chief Judge*

FRIENDLY, *Circuit Judge*, and MANSFIELD, *District Judge.**

Appeal from a judgment of conviction in the United States District Court for the Southern District of New York before Judge Charles M. Metzner and a jury for violations of 21 U.S.C. §§173, 174. Reversed and remanded for a new trial.

ROBERT M. MORGENTHAU, United States Attorney for the Southern District of New York, Daniel J. Sullivan and David A. Luttinger, Assistant United States Attorneys (on the brief), *for appellee.*

* Of the Southern District of New York, sitting by designation.

EDWARD BLESS, *Pro Se* (on the brief), *for appellant.*

MANSFIELD, *District Judge*:

After a five-day jury trial appellant Edward Bless was found guilty on December 1, 1968 of unlawfully selling heroin in violation of 21 U.S.C. §§173 and 174 as charged in Count 4 of an indictment naming him, Ralph Febre and Joseph Pego. On December 12, 1968, Bless was sentenced to a seven-year term of imprisonment, which he is presently serving. Although represented by counsel below, he now appeals *pro se,* challenging his conviction on various grounds. For the reasons stated below, we reverse.

The indictment contains five counts, the first of which charges Pego alone with a sale on February 14, 1967, of 14 grams of heroin. Counts 2 and 3 charge Pego and Febre with heroin sales made on February 20, 1967, and March 8, 1967; Count 4 charges all three defendants with a sale on April 6, 1967, of 236 grams of heroin; and Count 5 charges all with a conspiracy to violate §§173 and 174.

At the outset of trial Pego pleaded guilty to all five counts. Trial then proceeded on Counts 2 through 5 against Febre and Counts 4 and 5 against Bless. Extensive evidence was offered by the Government as part of its case-in-chief, and received by the court, with respect to the earlier sales of narcotics made by Pego and Febre. It was shown that on February 14, 1967, Special Agent Cook of the Federal Bureau of Narcotics was introduced to Pego by an informant in the vicinity of 170th Street and Jerome Avenue, the Bronx, and made a purchase of one-half ounce of heroin for $700, $650 of which was paid and the balance to be paid later. Further negotiations followed on February 20, 1967, with agents conducting surveillance of Pego, who

met with Febre in the Bat Cave Bar & Grill, following which Pego delivered an ounce of heroin to Cook for an agreed price of $1,400, receiving $1,250 on account with a balance due of $200, including the $50 owed on the first purchase. On February 23, 1967, Cook paid the $200 to Pego who immediately handed a wad of money to Febre.

When Agent Cook complained about the quality of the heroin that had been purchased on February 20, Pego offered to sell Cook an ounce of pure heroin on a money-back guarantee basis, and on March 8, 1967, he entered an apartment rented by Febre's brother at 1551 Walton Avenue, exited with Febre, and delivered a sample of the heroin to Agent Cook.

On March 13, 1967, Agent Cook and Pego negotiated for the purchase from Pego of a quarter kilogram of heroin for $8,700, following which Pego went to the Febre apartment at 1551 Walton Avenue and returned to report that his people were unable to obtain the drugs that evening. He suggested that Agent Cook wait a few weeks. On April 4, 1967, Cook and Pego arranged for the purchase on the following night, April 5, of a quarter kilogram of heroin.

There was no proof of Bless' involvement in any of the foregoing negotiations or sales. His participation did not commence until April 5, 1967. On that evening, pursuant to the arrangements made on April 4, Pego and Agent Cook met at the Port Authority bus station, 178th Street and Broadway, where Cook waited while Pego went to obtain the quarter kilogram of heroin to be sold to Cook. Pego then proceeded to the Bat Cave Bar & Grill, a few blocks away, joined Febre and Bless at the bar, and advised Febre that "the Negro" (Agent Cook) wanted "a quarter." Thereupon Febre turned to Bless and inquired if Bless "could handle it." Bless said that he could and that it would take about 45 minutes. Bless left the bar and drove away, leav-

ing Pego and Febre together at the bar. There followed a conversation between Pego and Febre in which Febre said that "things were going to be much better now that Willy was dead because Eddie was a much better guy to get along with." At 9:45 P.M. Bless reappeared and advised Pego and Febre "It can't be done tonight. It has to be tomorrow." Pego left the bar and told Agent Cook that he had spoken with his source of supply who advised that the delivery could not be made until the following day. On April 6, 1967, Pego delivered the quarter kilogram of heroin to Agent Cook and was arrested.

Although there was no proof that Bless had participated in any of the narcotics sales or negotiations prior to April 5, the trial court, over the objections of Bless' counsel, admitted "subject to connection" the evidence of the earlier Cook-Pego-Febre negotiations and sales as proof under Count 5, which charged all defendants with participation in a conspiracy to violate §§173 and 174 beginning on or about January 1, 1967. In admitting the evidence against Bless "subject to connection" Judge Metzner stated to the jury "I will further instruct you as to this later on in the trial" (Tr. 56).

At the close of the Government's case the court denied Bless' motion for a severance of himself from Count 4, but granted his motion for severance of Count 5 on the ground that instead of proving the one conspiracy alleged in Count 5, the proof revealed two conspiracies, an earlier one between Pego and Febre, and a later one, beginning on April 4 or 5, 1967, when Bless for the first time became a participant in a narcotics sale. In so ruling the court leaned heavily upon the April 5 conversation between Pego and Febre regarding "Willy" and "Eddie," which implied that "Eddie" [Bless] had not been the supplier for the earlier sales. There was later proof that a friend of Bless named "Willy" had died in late March or April

1967 (Tr. 376-377), which postdated the earlier transactions.

In severing Bless from Count 5 Judge Metzner, out of the jury's presence, sustained Bless' objection to exhibits relating to earlier narcotics sales (Exs. 3, 6 and 6A) and granted Bless' motion that "insofar as the defendant Bless is concerned . . . there be stricken, or the jury be instructed to disregard, any evidence of events prior to April 4, 1967 in their consideration of the guilt or innocence of the defendant Bless. . . ." (Tr. 298). Thus the court decided that Bless was not sufficiently connected with the earlier narcotics sales to permit evidence of them to be considered against him. However, the jury was never so instructed.

In his summation Bless' counsel stated:

> "He [Bless] is not chargeable in any way whatsoever, and His Honor will instruct you on this, with the events of February 20th, with the events of February 23, with whatever transpired in March. That is not his concern. So far as your deliberations concerning Edward Bless, it is as if you never heard that" (Tr. 528).

No such instruction was given. Although Judge Metzner instructed the jurors that the guilt or innocence of each defendant was to be determined separately, he also charged that in their consideration of the case against Febre and Bless evidence of "Pego's activities or conversations" was "relevant to the extent that you believe that testimony and find it connected to the counts that you will consider" (Tr. 600); and that with respect to the charge against Febre, Bless and Pego in Count 4 "each is chargeable with the acts and statements of the other, which may be considered by you in determining the four

elements of the crime" (Tr. 614). In discussing the Count 5 conspiracy charge, which remained against Febre, the court also read to the jury overt act No. 3 to the effect that on April 5, 1967, in pursuance of the conspiracy, Bless, Febre and Pego met at 4271 Broadway, the address of the Bat Cave Bar & Grill (Tr. 617).

The foregoing statements not only failed to exclude the evidence of the earlier transactions from consideration by the jury against Bless, but could well have led the jurors to believe that they were entitled to consider it against him. Recognizing this his counsel, before the case was submitted to the jury, excepted to the charge as follows:

> "Lastly, your Honor, I had in my summation called the specific attention of the jury to the fact that your Honor would probably charge that in a consideration of the guilt of the defendant Bless their attention would be devoted solely to the events in and about April 5, 1967 and they are not to consider any of the other evidence which has been taken subject to connection. I wonder if I might request at this time that your Honor charge the jury to that general effect because you did admit evidence subject to connection" (Tr. 627).

The requested instruction was denied.

In view of the nature of the charges, a joint trial was permissible and the court properly refused to sever Bless from Count 4.[1] *Schaffer* v. *United States*, 362 U.S. 511,

[1] In the exercise of his discretion, Judge Metzner could have denied a severance as to Count 5. *United States* v. *Crosby*, 294 F.2d 928, 945 (2d Cir. 1961), leaving it to the jury, upon appropriate instructions, to decide whether there was more than one conspiracy. *United States* v. *Varelli*, 407 F.2d 735 (7th Cir. 1969).

514 (1960); *United States* v. *Aiken*, 373 F.2d 294, 299 (2d Cir.), *cert. denied*, 389 U.S. 833 (1967); *United States* v. *Kaufman*, 311 F.2d 695, 698 (2d Cir. 1963). Although not entitled to a severance, Bless was entitled to have the jury instructed that in determining his guilt or innocence on the remaining charge against him, it should limit itself to proof of the events postdating April 4, 1967, and not give any consideration or weight to the extensive evidence of the earlier February-March narcotics negotiations and sales on the part of his co-defendants. *United States* v. *Light*, 394 F.2d 908, 911 (2d Cir. 1968); *United States* v. *Kelly*, 349 F.2d 720, 756-757 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966); *United States* v. *Aquedi*, 310 F.2d 817, 829 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963). Since Judge Metzner, at an early point in the trial, stated that he would give such a charge (Tr. 298-299), it may well be that he mistakenly assumed that he had done so when he refused Bless' repeated request at the close of the trial.

Absent an instruction to the jury that the extensive evidence of the earlier narcotics sales was not to be considered in determining Bless' guilt or innocence of the charge that he made the April 6th sale, the jury may have concluded that Bless was somehow or other connected with the earlier sales and therefore guilty of the April 6th sale, even though there is no proof that he knew of or participated in the earlier dealings. Accordingly we conclude that the failure to give the requested instruction was sufficiently prejudicial to entitle Bless to a new trial.

We recognize that the evidence of the earlier events would in the joint trial have been before the jury for consideration against Febre, and that the jurors would have faced the difficult task of putting it out of their minds in considering the case against Bless. Cf. *Krulewitch* v.

United States, 336 U.S. 440, 453-454 (1948) (Jackson, *J.*, concurring); *Kotteakos* v. *United States*, 328 U.S. 750, 774 (1946). However, it does not appear that the jury would have been unable to have followed such an instruction, unless we are to downgrade the protective function of instructions as an essential instrument in the conduct of a joint criminal trial. *Tillman* v. *United States*, 406 F.2d 930, 935 (5th Cir.), *vacated as to one defendant on other grounds*, 395 U.S. 830 (1969); *Peterson* v. *United States*, 344 F.2d 419, 422 (5th Cir. 1965); *Gorin* v. *United States*, 313 F.2d 641, 647 (1st Cir. 1963), *cert. denied*, 379 U.S. 971 (1965); *United States* v. *Stromberg*, 268 F.2d 256, 264-265 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959); *United States* v. *Kahaner*, 203 F.Supp. 78, 81-82 (S.D.N.Y. 1962), *aff'd*, 317 F.2d 459 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963). The error cannot therefore be classified as harmless.

There is no merit to Bless' other points. His attack upon the presumption of knowledge of illegal importation arising from possession of heroin has been laid to rest by the Supreme Court's recent decision in *Turner* v. *United States*, —— U.S. —— (Jan. 20, 1970). See also *United States* v. *Febre*, —— F.2d —— (Dkt. No. 33241, Jan. 8, 1970).

For the foregoing reasons the judgment is reversed and the case remanded for a new trial as to Bless.

No. [redacted]-207

JUL 1 1970

[redacted], CLERK

In the Supreme Court of the United States

OCTOBER TERM, [redacted]1970

RALPH FEBRE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

WILL WILSON,
Assistant Attorney General,

BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1636

RALPH FEBRE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 1970. A petition for rehearing was denied on May 1, 1970. The petition for a writ of certiorari was filed on June 1, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether possession of heroin by petitioner was adequately proved.

2. Whether the trial court's instructions on possession were erroneous.

3. Whether reversal on two counts of a four-count indictment upon which petitioner was convicted, and for which equal, concurrent sentences were imposed, requires a remand for reassessment of the convictions or sentence.

STATEMENT

On October 27, 1967, a five-count indictment was returned in the United States District Court for the Southern District of New York against petitioner and two co-defendants, Joseph Pego and Edward Bless. Counts 1 through 4 charged sales of various quantities of unlawfully imported heroin on February 14, February 20, March 8 and April 6, 1967, with petitioner named in all but the first count. Count 5 charged all three defendants with conspiracy, from January 1, 1967, to the date of the indictment, to violate the federal narcotics laws. After a jury trial, petitioner was convicted on Counts 2, 3, 4 and 5. On December 12, 1968, he was sentenced to imprisonment for concurrent, six-year terms. The court of appeals affirmed petitioner's convictions on Counts 2 and 5, but reversed on Counts 3 and 4.

1. The evidence showed that on the evening of February 14, 1967, at the intersection of 170th Street

and Jerome Avenue in the Bronx, co-defendant Pego[1] sold 36 grams of heroin to undercover agent Clarence Cook (Tr. 49-55).[2] Cook stated that if satisfied with the quality he would thereafter make larger purchases (Tr. 55). At 9 p.m. on February 20, 1967, Cook notified Pego through an informant that he was interested in purchasing an ounce of heroin. Declaring that he would have to get the narcotics, Pego directed Cook and his informant to go to the latter's residence and await his telephone call (Tr. 57-59). Agents maintaining a surveillance of Pego's residence observed him depart from it at 9:20 and ride by taxicab to the Bat Cave Bar in Manhattan, arriving there at 9:35 p.m. (Tr. 117, 188-189). Petitioner met Pego there about an hour later. After a brief conversation inside, petitioner and Pego left the tavern and entered an automobile parked directly in front. They sat there for approximately five minutes. Then, leaving petitioner in the car, Pego reentered the bar at 10:30 p.m. and made his telephone call to Cook, informing him that he had the narcotics and directing him to be at 170th Street and Jerome Avenue in a half-hour (Tr. 60, 117-118, 190, 233). Pego then returned to petitioner's car, and they drove off. At the Jerome Avenue meeting site Pego left petitioner's car and met Cook. They completed their transaction, and then discussed purchases of even larger quanti-

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[1] Pego, named in all of the counts, entered a plea of guilty on the first day of trial. He did not testify for either side.

[2] "Tr." refers to the transcript of trial, which is on file with the Clerk of this Court.

ties if the price was desirable (Tr. 61-62, 119, 191). Pego then walked to his home, a few blocks away.

Pego met Cook on February 23 for the purpose of receiving money owed from the prior transaction. Cook asked about purchasing one-eighth of a kilogram of pure heroin. Pego quoted a price of $4,800 and assured the agent that the heroin would be undiluted (Tr. 63). On March 8, they again met at the Jerome Avenue corner. Cook expressed dissatisfaction with the quality of his February 20th buy, and requested a sample before he would commit himself to any further purchases. Pego agreed and arranged for a meeting at another location later that evening. Pego then proceeded to an apartment rented by petitioner's brother. A few minutes later he and petitioner emerged from the apartment building and departed in opposite directions (Tr. 124, 192). Pego met Cook and gave him the desired sample. Cook agreed to contact Pego in a few days regarding the proposed one-eighth kilogram purchase (Tr. 65).

At their next meeting on March 13, 1967, Cook increased his request to one-quarter of a kilogram. The price was set at $8,700 (Tr. 69-70). Pego then went to petitioner's brother's apartment, following which he met agent Cook and announced that there was some delay in acquiring a one-half kilogram batch, from which the one-quarter desired by Cook would be taken (Tr. 71, 127). Pego returned to the apartment. Later that evening he informed Cook that his "people" would not obtain the narcotics for a couple of weeks (Tr. 71). On April 4 Pego stated

that they could consummate the transaction the next day (Tr. 72).

At 8 p.m. on April 5, Pego told Cook to wait in the Port Authority Bus Terminal at 178th Street and Broadway while he obtained the heroin. Pego then drove the few blocks to the Bat Cave Bar. Inside, he sat on a stool next to another undercover agent (Tr. 236-238). The agent saw petitioner approach Pego, ask if he had seen "the Negro" (*i.e.*, Cook), and say, "What does he want?" (Tr. 238). On learning of the quantity of narcotics desired by Cook, petitioner turned to co-defendant Bless, who was sitting nearby, and asked if he could "handle it." Bless replied that it would take about 45 minutes. Pego indicated that the timing was good because he had scheduled his delivery for 9:30. Bless departed and petitioner sat on the stool vacated by Bless (Tr. 239-240). He continued to converse with Pego, remarking at one point that the operation would be running smoothly because Bless was easier to get along with than his predecessor (who had recently died). At approximately 9:45 p.m. Bless returned and told the others, "It can't be done tonight. It has to be tomorrow" (Tr. 242). Petitioner raised his voice, demanding to know the reason for the delay. Bless told him to lower his voice, and they continued their conversation. Pego then left the bar and met Cook, informing him that he had spoken with his source of supply and that delivery would be delayed until the following day (Tr. 73-74). The following afternoon Pego and Cook met in Cook's car at the customary Jerome Avenue location (Tr. 75). As Cook drove, Pego produced a quarter

kilogram package. Responding to a prearranged signal, agents who had been following Cook's car intercepted it and arrested Pego (Tr. 75, 140-141).

2. The court of appeals reviewed each of the four counts upon which petitioner had been convicted, directing its attention particularly to petitioner's allegation that the proof did not show that he knew the heroin had been unlawfully imported, since there was no direct evidence of knowledge and inadequate proof of "possession" to permit reliance on the statutory presumption contained in 21 U.S.C. 174. All of the judges on the panel concluded that, as to Count 2, the jury could reasonably have found that petitioner had personally delivered the heroin to Pego on February 20, and, accordingly, had actually possessed it; consequently, they sustained the convictions on that substantive count and conspiracy (Count 5). Reviewing the evidence supporting Counts 3 and 4, involving Pego's trip on March 8 to the apartment house in which petitioner's brother resided, and the incident in the Bat Cave Bar on April 5, however, the court determined that the connection between Pego and petitioner was insufficient to support the convictions.

Recognizing that petitioner had received equal, concurrent sentences on all counts, the majority nevertheless chose not to invoke the concurrent sentence doctrine insofar as the convictions were concerned, but instead ordered counts 3 and 4 reversed. The majority also decided that, despite this partial reversal, it would not remand for a new trial on the remaining counts, reasoning that the evidence sup-

porting those counts was so separate and distinct from the evidence on the defective counts that the jury could not have mistakenly considered other evidence while determining guilt on the valid counts. It also found no reason to remand for resentencing, since petitioner's sentence was only one year longer than the statutory minimum and there was strong indication that the number of counts did not affect the sentence (Pet. App. 13). The majority referred to the fact that Bless received a sentence of seven years on conviction of one count and Pego received concurrent, five-year terms following his plea of guilty to five counts.[3]

ARGUMENT

1. The court of appeals correctly determined that there was sufficient proof of possession by petitioner of the narcotics involved in Count 2 to give rise to the statutory presumption that he knew the heroin had been imported. When agent Cook first ordered the heroin on February 20, Pego said that he did not have it and would have to get it. Pego then went to the Bat Cave Bar. Whether or not Pego might have conversed with a number of customers while there, it was only after petitioner had arrived and had conferred privately with Pego that the promised tele-

[3] Judge Hays dissented on the question whether a remand was appropriate. He suggested that, in light of this Court's opinion in *Benton* v. *Maryland*, 395 U.S. 784, the concurrent sentence doctrine was ripe for "total elimination" in "a proper case" (Pet. App. 14), and would have remanded not only for resentencing but also for a new trial on Counts 2 and 5 (*id.* at 14-15).

phone call to Cook, announcing that the heroin was now available, was made. Immediately after the conference and telephone call, petitioner and Pego together drove to the meeting with Cook to complete the sale. From this evidence the jury could reasonably infer that, at the very least, petitioner shared with Pego the possession of the heroin sold to the agent on that occasion. *Cazares-Ramirez* v. *United States*, 406 F. 2d 228 (C.A. 5); *United States* v. *Baratta*, 397 F. 2d 215, 224 (C.A. 2), certiorari denied, 393 U.S. 939; *Smith* v. *United States*, 385 F. 2d 34, 39 (C.A. 5); *United States* v. *Tucker*, 380 F. 2d 206 (C.A. 2); *United States* v. *Lopez*, 355 F. 2d 250 (C.A. 2), certiorari denied, 384 U.S. 1013.[1]

2. Petitioner failed to submit written requests for instructions and took no exceptions to any part of the trial court's charge. His attempt on appeal to assert instructional error thus contravenes the explicit provisions of Rule 30, F.R. Crim. P. In any event, petitioner's claims are not meritorious.

As noted by the court of appeals (Pet. App. 9-11), the instruction on joint undertakings did not allow the jury to convict petitioner merely by attaching to him the criminality of Pego; rather, the court told the jury that once petitioner and others had been found to have been involved in a common criminal plan, it could consider the acts and statements of the others in determining whether petitioner possessed

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[1] The evidence of petitioner's subsequent conduct would have been admissible both on the conspiracy count and on Count 2, since it tended to show petitioner's relationship to the others. There was thus no reason to order a new trial.

narcotics. On the conspiracy count, while it might have been the better practice to give a specific charge on possession by petitioner personally while discussing the conspiracy count, the absence of such an instruction at that juncture was not plain error, since the conspiracy charge incorporated the instructions on the substantive count, which specifically referred to the element of possession. See *United States* v. *Baratta*, 397 F. 2d 215 (C.A. 2), certiorari denied, 393 U.S. 939. Petitioner points to decisions in the Fifth and Ninth Circuits which he characterizes as reaching the opposite result—*Hill* v. *United States*, 379 F. 2d 811 (C.A. 9); *Smith* v. *United States*, 385 F. 2d 34 (C.A. 5). Petitioner does not discuss, and we are unable to perceive, how *Smith* is in conflict with the holding here. The *Hill* decision is distinguishable on its facts, which failed to show a connection between the defendant (last seen on November 8) and the marihuana transaction (two days later). Moreover, there was in that case an aiding and abetting instruction which enabled the jury to find guilt without personal knowledge of importation (see 379 F. 2d at 814).

3. Even prior to *Benton* v. *Maryland*, 395 U.S. 784, the Court of Appeals for the Second Circuit had deemed non-jurisdictional the rule against reversing convictions on some counts of a multi-count indictment where concurrent sentences had been imposed. Thus, in an appropriate setting it has in the past remanded for resentencing after such a partial reversal. *United States* v. *Hines*, 256 F. 2d 561 (C.A. 2); see *United States* v. *Scandifia*, 390 F. 2d 244, 250, n. 7, (C.A.

2), vacated on other grounds *sub nom. Giordano* v. *United States*, 394 U.S. 310; *United States* v. *Barash*, 365 F. 2d 395, 399 (C.A. 2); *United States* v. *Bottone*, 365 F. 2d 389, 394 (C.A. 2), certiorari denied, 385 U.S. 974. In the present case, however, the majority was reasonably convinced that the number of counts did not influence the trial court's determination of the sentence, which was only one year above the minimum (see *supra*, p. 7). Since nothing in the record suggests the contrary, the decision not to require reassessment of petitioner's sentence was not an abuse of discretion.[5] See *Saville* v. *United States*, 400 F. 2d 397 (C.A. 1), certiorari denied, 395 U.S. 980. Nor does petitioner make a convincing showing that the majority below erred in concluding that it is "highly unlikely that the evidence presented on the two counts [on which it] reversed could have been mistakenly considered by the jury as tending to establish guilt" on the other two counts (Pet. App. 12-13). This was so, the majority determined, because "[C]ount two arose from a discrete series of events" and, in any event, "the testimony on the reversed counts would have been before the jury even had these counts been dismissed, for all of this evidence tended to show the existence of the conspiracy charged in count five" (*id.* at 13).

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[5] In any event, the district court may still consider reduction of the sentence if request is made under Rule 35, F. R. Crim. P.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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